IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CRIMINAL APPLICATION NO 119 OF 2001

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Order ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Order ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HARSHAD V SHAH

VERSUS

SUDARSHANBHAI R SHAH

Appearance:

MR BHARGAV BHATT for the Petitioner

MR SAMIR DAVE APP for the Respondent No.2

MR SHAKTI SINGH GOHIL for the Respondent No.1

CORAM : MR JUSTICE S.K.KESHOTE

Date of Order : 26/04/2001

C A V JUDGMENT

#. This petition under Article 226 and 227 of the Constitution of India is directed against the order of the learned Sessions Judge, Bhavnagar dated 14.2.2001 in the Criminal Revision Application No.11 of 2001 under which he has confirmed the order passed by the Second Joint Judicial Magistrate, First Class, Bhavnagar below Ex.56 in Criminal Case No.1760 of 1998. Exh.56 is the application filed by the petitioner who is accused in Criminal Case No.1760 of 1998 filed by respondent No.1 under Section 138 of the Negotiable Instrument Act. This application is purported to be filed under Section 311 of the Criminal Procedure Code, 1973.

#. This petition can only be under Article 227 of the Constitution of India. The facts of the case are that on 1.5.1998 the respondent No.1 had filed a complaint against the petitioner for the offences punishable under Section 138 of the Negotiable Instruments Act and the same is registered as Criminal Case No.1760 of 1998 in the court of Chief Judicial Magistrate, Bhavnagar. Cognizance in the criminal complaint has been taken. It is not in dispute that the complainant has been cross-examined at length by the accused. After completion of the evidence of the complainant, statements of the petitioner were recorded under Section 313 of the Criminal Procedure Code, 1973. It is made clear that the petitioner does not want to produce evidence in defence. Statements of the petitioner under Section 313 of Criminal Procedure Code were recorded on 22.2.2000. Naturally when the petitioner was not desired to produced any evidence in defence the learned trial court has rightly posted the matter for final hearing. Matter is reached an another step that complainant has complained his arguments. This application under Section 311 of the Criminal Procedure Code came to be filed by the petitioner on 11.10.2000. In this application prayer has been made for grant of permission to recall the complainant for further cross examination and examine one Shri Jaysukhbhai T. Sanghvi, Financial Broker in defence, in the interest of natural justice and oblige. This application was opposed by the learned counsel for the complainant. After hearing the arguments of the learned counsel for the parties this application was came to be rejected by Second Joint Judicial Magistrate, First Class, Bhavnagar under its order 15.1.2001 and as said earlier which order has been confirmed in the revision by Sessions Judge, Bhavnagar under its order 14.2.2001 also hence this petition before this court.

#. The learned counsel for the petitioner relying upon the decision of the apex court in the case of Selvi J. Jayalalita Vs. State by Deputy Supdt. of Police, Chennai reported in 2000(9) SCC 754 contended that the application at Exh.56 may be allowed and permission be granted to the petitioner to further cross examine the complainant as well as to examine his one witness. It has next been contended that Section 311 of the Cr.P.C. confers wide powers to the judicial court to recall the witness for cross examination and also to permit the parties to the case to examine their witnesses after completion of the evidence. It is submitted that both the courts not considered this aspect. Mr.Bhatt submits that the courts exist to do the justice to the parties and not to condemn them without giving full opportunity of producing the defence.

#. In contra, the learned counsel for the respondent No.1 contended that this application filed by the petitioner is nothing but only an attempt on the part of the petitioner to delay the proceedings of the case. It has next been contended that under Section 311 of the Cr.P.C. this application is not maintainable. This provision empowers the court for its necessity and not for confirming rights to the parties to the litigation. It is submitted that the petitioner himself has not desired to examine any witness in defence and now after such later stage where the arguments of complainant have also been completed this application it filed which is not on the face of it is bonafide one. It is filed with oblique motive and purpose. Relying on the decision of the apex court in the case of Mir Mohmad Omar Vs. State of West Bengal reported in AIR 1989 SC 1785 the learned counsel for the respondent No.1 submitted that after closure of the evidence the petitioner has not right to re. call for cross-examination any witness or to produce his defence under Section 311 of the Criminal Procedure Code.

#. I have given my thoughtful consideration to the submissions of the learned counsel for the parties.

#. This Special Criminal Application arises from a private complaint filed by the respondent No.1 against the petitioner for offences punishable under Section 138 of the Negotiable Instruments Act.

#. In that complaint, it is not in dispute that the State of Gujarat is not a party. The State of Gujarat is not a party to the complaint out of which this special criminal application has arisen, I fail to see how it is

necessary or proper party to these proceedings under Article 227 of the Constitution. The State is not a Prosecutor in this matter. Learned counsel for the petitioner submits that as per the High Court Rules, in all the criminal matters, the State of Gujarat has to be impleaded as a party. He has failed to point out any Rule from the High Court Rules where such a provision is there. I have already taken a view after considering the High Court Rules that in such matters, the State of Gujarat is neither necessary nor proper party. By impleading State of Gujarat as party in this matter where it is neither necessary nor proper party and in fact and substance the petitioner has also not claimed any relief against it, the State has unnecessarily been financially burdened. Where the State of Gujarat is impleaded as a party and notice is issued to it, naturally it has no option except to instruct the Government Advocate to appear in the matter and when the Government Advocate appears in the matter legitimately he can raise his bill of fees and corresponding obligation on the State of Gujarat to make payment thereof. The litigants in the Court should be very careful and vigilant in impleading the parties in the case. Impleading a party which is neither necessary nor proper, unnecessarily puts financial burden thereon. As the State of Gujarat is neither necessary nor proper party, joining it as respondent No.2 in this petition by the petitioner is wholly unjustified and unreasonable and for this financial burden, which the State of Gujarat has to undertake, the petitioner is to compensate it.

#. Each case has to be decided on its own facts. It is also no more res integra that the ratio of the decision is to be taken in the context of the facts of the case in which the same has been given. Much emphasis has been laid by the learned counsel for the petitioner on the decision of the Apex Court in the case of Selvi J. Jayalalitha vs. State by Dy. Superintendent of Police, Chennai (supra), I consider it to be appropriate to refer to that judgment first. This is a short judgment and I consider it to be appropriate to reproduce paras 3, 4 and 5 thereof in this judgment.

> "3. The appellant is the 1st accused in a criminal case now pending before the XIIth Additional Sessions Judge II, Chennai. As the prosecution evidence was closed the trial Judge proceeded to question the accused under Section

313 of the Code of Criminal Procedure. On completion there the trial court posted the case for defence evidence on 29-3-2000. As the appellant did not produce any defence evidence nor presented any list of defence witnesses the trial court posted the case again to 11-4-2000. On that day also the appellant did not produce any defence witness nor any list of witnesses to be examined on the defence side. It was hence posted on the next day i.e. 12-4-2000 for the same purpose. As nothing happened on that day also the trial court chose to close the evidence for defence and posted the case for arguments. In the meanwhile the appellant filed an application for recalling some of the witnesses already examined for the prosecution, under Section 311 of the Code of Criminal Procedure (hereinafter referred to as "the Code"). The trial court did not find the necessity for recalling such witnesses for a just decision of the case. The order dismissing the application for recalling prosecution witnesses as well as

the order closing the defence evidence had been challenged by the appellant before the High Court of Madras under Section 482 of the Code, a learned Single Judge of the High Court dismissed that petition by the impugned order.

4. True, the appellant was given opportunities to present the defence evidence or to produce the list of defence witnesses and the appellant has not availed herself to those opportunities. Yet as a court of justice we are of the view that one more opportunity can be granted to the appellant for examining the defence witnesses if she proposes to do.

5. Learned counsel for the appellant submitted that 4 witnesses are to be examined on the defence side for which a list has been produced before us consisting of the following persons:

1. Selvi J. Jayalalitha (Accused 1)
2. S. Natarajan
3. S. Chandra Mohan
4. K.Vaidhiyanathan, Television Technician"

#. Having gone through the text of the decision, I find that in the facts of that case, the Court has granted indulgence to the appellant therein. Otherwise also, the Hon'ble Supreme Court under Article 142 has much wide powers than this court sitting under Article 227 of the Constitution. That judgment was given in the peculiar facts of that case.

##. So far as the powers of this Court under Article 227 of Constitution is concerned, here fruitfully reference may have to the decision of the Apex Court in the case of Laxmikant Revachand Bhojwani vs. Pratapsinh Mohansinh Pardesi reported in 1995 (6) SCC 576. Therein their Lordships of the Hon'ble Supreme Court held that the High Court may not be justified in extending its jurisdiction under Article 227 of the Constitution in all the cases. That matter came up before the Hon'ble Supreme Court in respect of the dispute between the tenant and the landlord. In that context, their Lordships of the Hon'ble Supreme Court observed that the Act is a special legislation governing the landlord and tenant relationship and disputes. The Legislature, what the Court stated, in its wisdom has not provided second appeal or revision to the High Court. The object is to give finality to the decision of the Appellate Authority. The Court further held that the High Court under Article 227 of the Constitution cannot assume unlimited prerogative to correct all species of hardships or wrong decisions. It must be restricted to cases of grave dereliction of duties and flagrant abuse of fundamental principles of law or justice where grave injustice would be done unless the High Court interferes. The order passed by the learned Judicial Magistrate on the application of the petitioner filed under section 311 of Cr.P.C., may be an interlocutory order and against this order though this matter has not been agitated and considered and decided by the revisional court, revision may not be maintainable. Be that as it may. The Legislature has not provided second revision application to this Court under Section 397 of Cr.P.C. and the obvious reason is to give finality to the orders. In case this is what the legislature mandate against the order of the Sessions Court passed in revision application, if this Court lightly interferes therewith under Article 227 of the Constitution of India then it will undo that provision. Under Article 227 of the Constitution of India, interference of this Court is called for only in exceptional cases of hardships and grave injustice. What my experience goes that Article 227 of the Constitution is made as a provision of second

revision application before this Court by the litigants which is barred by the legislation. Another aspect which needs to be referred here is that where the Legislature in its wisdom has not provided revision application against the interlocutory order and where the order is interlocutory one and it is not revisable how far it would have been permissible to this Court to interfere therewith under Article 227 of the Constitution. At the cost of repetition, it is to be stated, though I am not expressing any final opinion but prima-facie the order passed by the Judicial Magistrate may be an interlocutory order. That bar has been created for the reason that even if the order suffers from illegality or error or defect, corrective remedial measure is available i.e. to challenge the same, if occasion arises, in appeal to be filed against the final judgment of the Court. This bar has been created by the legislation of revision against the interlocutory order as well as second revision or appeal in this court may be fore the reason so that unscrupulous litigant may not stall the final adjudication of the matters by challenging interlocutory orders by filing revision applications.

##. Having gone through the judgments, I am satisfied that the courts below have not committed any error or illegality whatsoever in passing of the same which calls for interference of this court under Article 227 of the Constitution of India. It is a case where on dishonour of cheque given by petitioner to the respondent, the later filed a complaint for offence under section 138 of the Negotiable Instruments Act. In such matters, in case the cheque has been given, it is hardly material whether it was given through the broker or directly. The drawee of the cheque should have come up with all honesty and fairplay in the Court. Rather than to contest these proceedings to mitigate the possibility of taking severe and stern judgment on proof of charges, the amount should have been paid. It is unfortunate that in these matters persons are not making payment of the amount of dishonoured cheque and take all flimsy, frivolous and baseless grounds and make all endeavour to delay proceedings of criminal case. This case falls under this category. Here also the petitioner has made all the attempts to see that criminal case may not be completed at an early date. It is not in dispute that the complainant has been cross-examined at length by petitioner. Merely because some judgment of this court came subsequently, it does not furnish any justification to the petitioner to file an application for recalling of the complainant for further cross examination and permission to examine one witness in defence. If this

course is adopted, then there may not be end to such applications for recalling of the witnesses for further cross examination. This is not the law meant for and suggests as what it is claimed by petitioner by resorting to the provisions of Section 311 of the Criminal Procedure Code. This prayer made by petitioner for recalling of the complainant for further cross-examination on the ground as given in para-2 of the application is perverse and rightly it has not been accepted by both the courts below. Second prayer made for examination of witness - Jaysukhbhai T. Sanghavi, financial broker, it is suffice to say that the approach of both the courts below to decline it cannot be said to be perverse or arbitrary. It is rightly said by the learned Sessions Judge, that the petitioner's own defence was that this amount has been given through broker. Reference has been made by learned Sessions Judge to the statements of the petitioner himself wherein he stated that the transaction was done through broker. It may be true that the complainant would have come up with the case that the transaction was directly done but in the receipt ex.19, it is also written through J.T.S.. In these facts, and more so in view of the statements of the accused himself, if he was really desirous of examining Jaysukhbhai T. Sanghavi as defence witness, he could have been examined. But he has not examined that witness, meaning thereby, he has given up his right to examine the witness. How far it is justified for him after closure of evidence and arguments of the complainant to file this application. I find sufficient merits in the contention of the learned counsel for respondent No.1 that this is nothing but a malafide application on the part of the petitioner to delay the proceedings of criminal case. The remedy under Article 227 of the Constitution is not meant for those litigants who are filing applications for some oblique motives or purposes. This application by petitioner under Section 311 of the Code is clearly on the face of it is filed with the object and purpose to delay the proceedings in criminal case. The statements of the accused petitioner were recorded on 22.2.2000 and we are in the month of April 2001 and arguments of complainant have also been completed still the matter could not be finalised. I do not find any justification in the approach of the Magistrate not to complete the matter expeditiously where arguments of complainant have been completed.

##. As a result of aforesaid discussion, this petition which is wholly misconceived and misplaced deserves to be dismissed and accordingly it is dismissed. Rule discharged. Interim relief earlier granted stands

vacated. The learned counsel for the respondent No.1 submits that he has provided free professional services to respondent No.1. Though this is a fit case for awarding cost in favour of respondent No.1 but in view of the aforesaid statements of the counsel, no order as to costs in favour of respondent No.1. In this case, the State of Gujarat was neither necessary nor proper party and as said earlier by joining it as a party, the State exchequer has unnecessarily been financially burdened. The petitioner is directed to pay Rs.1,000/= as cost of this petition to the State of Gujarat.

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*Pvv/Zgs/Sunil